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SUPREME COURT, U.S.

NO. 81-6598

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WAYNE LADD KRIER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the trial court committed constitutional error by refusing to charge the jury on voluntary manslaughter in a death case?

II.

Whether Petitioner's statements were properly admitted into evidence when there was contradictory evidence ot Petitioner's refusal to waive his Miranda rights to authorities in the asylum state?

III.

Whether the trial court's instructions on statutory aggravating circumstances properly channeled the jury's consideration?

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PART ONE

STATEMENT OF THE CASE

Petitioner was indicated in DeKalb County, Georgia, during the September Term of 1979 for the murder of Teresa Lavin. Following a trial by jury, Petitioner was convicted of murder and the jury imposed the death sentence. Petitioner's Motion for New Trial was denied by the trial court and Petitioner filed a Notice of Appeal to the Supreme Court of Georgia on June 9, 1981.

On direct appeal, Petitioner enumerated nine errors; only three of those are raised in the present petition. The Supreme Court of Georgia affirmed the conviction as well as the death sentence pursuant to the statutory sentence review procedure. See Krier v. State, 249 Ga. 80, 287 S.E.2d 531 (1982).

Further facts will be developed, as necessary, for a more thorough illumination of any issue in this petition for a writ of certiorari.

PART TWO

SUMMARY OF ARGUMENT

I.

Based on the evidence adduced at Petitioner's trial, a charge on voluntary manslaughter was not warranted under Georgia law. The present case is not controlled by Beck v. Alabama, infra, where the State court was absolutely precluded, by statute, from instructing on lesser offenses in capital cases.

II.

Petitioner's written and recorded statements given to Georgia authorities were not rendered inadmissible by virtue of contradictory evidence of Petitioner's refusal to waive his Miranda rights when first taken into custody by New Orleans police. Edwards v. Arizona, infra, is distinguishable because Petitioner's refusal to waive his rights is disputed and because Georgia authorities had no knowledge of Petitioner's alleged assertion of his right to remain silent.

III.

During the sentencing phase, the jury was properly instructed as to the statutory aggravating circumstance; examination of the jury instructions clearly rebuts Petitioner's contention that the jury may have used his prior armed robbery conviction and escape for the basis for imposition of the death sentence.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT AND THE GEORGIA SUPREME COURT PROPERLY DETERMINED AS A MATTER OF LAW THAT THE EVIDENCE ADDUCED AT PETITIONER'S TRIAL DID NOT WARRANT A CHARGE ON VOLUNTARY MANSLAUGHTER.

Following the close of evidence at the guilt-innocence phase of trial and Petitioner's written request for a charge on voluntary manslaughter, the trial judge refused to so instruct on the basis that no evidence of provocation had been shown. (T. 1286). Petitioner contends that the death penalty may not be constitutionally imposed when the trial court determines, as a matter of law, that the evidence of provocation is insufficient to warrant a jury charge on voluntary manslaughter.

In Georgia, the offense of voluntary manslaughter is defined as follows:

> A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person: however, if there should have been an interval between the provocation and the killing

> sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and punished as murder. Ga. Code Ann. § 26-1102 (emphasis added).

The Georgia Supreme Court has held that an instruction on voluntary manslaughter is warranted in cases which present any evidence, however slight, of the lesser offense. The determination of whether the "any evidence, however slight" standard has been met is not for the jury:

> It is a question of law for the courts to determine whether there is slight evidence that the defendant acted as a result of sudden, violent and irresistible passion resulting from serious provocation. Henderson v. State, 234 Ga. 827, 831, 218 S.E.2d 612 (1975).

A review of the record in the present case clearly indicates no evidence of serious provocation. Although Petitioner's testimony as to the events immediately preceding his brutal knife killing varied, none of the versions presented by Petitioner's confessions or trial testimony established any serious provocation.

Petitioner's first written and recorded statements describe a situation where Petitioner made an advance or tried to touch the victim and she reacted by hitting him on the chest. (T. 1140, 1162). The following afternoon, Petitioner made a second set of written and recorded

statements; Petitioner stated that while sitting on the couch smoking a "joint" he reached to touch the victim's shoulder, at which time she started hitting Petitioner "with the ball of her fists." (T. 1180, 1186-87).

Petitioner's trial testimony, which was considerably more detailed, revealed that the victim had resumed vacuuming when Petitioner:

> . . . grabbed her arm kind of to get her attention more than anything else, you know, hi, listen to what I got to say type of thing, and she turned around and when she turned just the look on her face was I don't know, almost like, what the hell are you doing here type thing, where did you come from? And it kinda threw me back for a minute and then she just kept staring at me, you know, all of a sudden I felt the big complex thing and I slapped her . . . with my hand . . . apparently it was pretty hard. (T. 1243-44).

On cross-examination, Petitioner stated that his prior statements were the truth only "to an extent." (T. 1282).

Petitioner's reliance on this Court's decision in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.E.2d 392 (1980) is misplaced. The Beck case is distinguishable from the case at bar in several fundamental aspects. First, the Beck case involved a challenge to an Alabama statute which had been construed as precluding instructions on lesser offenses in capital cases, 1/ as opposed to the present case where the

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1/ Alabama Code Section 13-11-2(a) (1975) provides: "If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be avered in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses." (emphasis added).

trial judge, having heard all of the evidence, made a legal determination as to whether there was any evidence of serious provocation. Second, the evidence in the Beck case would have supported a verdict on the lesser included offenses; the State conceded that under Alabama case law the defense would have been entitled to instructions on both felony murder and robbery absent the statute prohibiting such instructions. 447 U.S. at 630 n. 5. Finally, this Court explicitly approved the predominant state court rule that a defendant is entitled to a charge on lesser offenses only when warranted by the evidence. The teaching of the Beck decision is that a State can not arbitrarily preclude jury consideration of lesser offenses in death cases; there is no suggestion that such instruction should be given automatically or indiscriminately. 2/

Petitioner also seeks support from language in Gregg v. Georgia, 428 U.S. 153, 163, 96 S.Ct. 2909, 49 L.E.2d 859 (1976):

> If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence. Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948). See Linder v. State, 132 Ga. App. 624, 625, 208 S.E.2d 630, 631 (1974).

Petitioner seems to suggest that the instant case has been decided on principles different from those set forth in Linder v. State and Sims v. State, supra. The Linder decision set forth the "any evidence, however slight" rule but that case

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2/ See Jackson v. State, 337 So.2d 1242 (Miss. 1976).

involved undisputed serious provocation (dispute only as to quantum) and the Georgia Supreme Court held that the jury was to determine the amount of provocation and the interval between the provocation and the killing. 3/

Based on the foregoing, Petitioner's argument regarding the failure to charge the jury on voluntary manslaughter does not present an issue for review by this Court.

3/ The Sims decision involved rape and the lesser offense of assault with intent to rape or assault and battery; there is no discussion in that case of murder and voluntary manslaughter.

II. CONTRARY TO PETITIONER'S CONTENTION, THE TRIAL COURT AND THE GEORGIA SUPREME COURT PROPERLY DETERMINED THAT PETITIONER'S STATEMENTS WERE GIVEN IN COMPLIANCE WITH THE MIRANDA DECISION.

Petitioner contends that these four written and recorded statements to Georgia authorities were improperly admitted because Petitioner allegedly refused to waive his Miranda rights when initially taken into custody by New Orleans police.

Approximately ten days after the murder, Petitioner was arrested by New Orleans police who had been advised by the Georgia authorities to look for Petitioner in "flop houses" near the Greyhound Bus Terminal in New Orleans.

The evidence is contradictory as to whether Petitioner waived his right to remain silent or asserted his right to have an attorney present when conferring with New Orleans police. Petitioner claims that he indicated his desire for a lawyer (T. 210-11) and two arrest reports executed by the New Orleans police indicate a refusal to waive his rights (T. 265-66); however, both parties stipulated that if New Orleans Detective Norman Pierce was subpoenaed he would testify that he was the first person to talk with Petitioner in the New Orleans police station, that Petitioner was advised of his rights, waived those rights and never requested an attorney. (T. 226-27). Petitioner testified that he was never provided a lawyer in New Orleans (T. 211-12, 215); however, on cross-examination Petitioner did indicate that he was provided with the services of a public defender for his extradition hearing. (T. 220).

It is uncontradicted, however, that Detective Rowell of the DeKalb County (Georgia) Police Department was never advised by New Orleans police that Petitioner had either refused to waive his rights or asserted the right to counsel. (T. 202).

It is also uncontradicted that Detective Rowell fully advised Petitioner of his rights on at least four separate occasions. Initially, Detective Rowell advised Petitioner of his rights when he first met with Petitioner in New Orleans and Petitioner executed a written waiver. (T. 134, 1546). At that time, Detective Rowell questioned Petitioner briefly about a possible accomplice, Cody, but did not question Petitioner regarding his participation in the murder.

After Petitioner was returned to Georgia, Detective Rowell again advised him of his constitutional rights, Petitioner once again executed a written waiver and proceeded to give Detective Rowell a statement about the murder. (T. 138, 1547). A written statement made by Petitioner shortly thereafter also clearly indicates his intention to waive such rights (T. 142, 1139-42) as did his tape recorded statement on the same evening. (T. 147-178).

The following afternoon, after again advising Petitioner of his rights (T. 181), Detective Rowell sought to question Petitioner further about the details of the murder. Petitioner's written statement indicates that he had been advised of his rights. (T. 181). Petitioner also made a tape recorded statement that afternoon wherein he was fully advised of his rights again. (T. 185).

A review of this record indicates that Petitioner executed two written waivers and was advised of his rights on no less than four separate occasions by DeKalb County police.

The Georgia Supreme Court held that these facts were distinguishable from the circumstances of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.E.2d 378 (1981) because there was contradictory evidence as to whether Petitioner requested counsel in New Orleans and because Petitioner's statements were made after he had waived extradition, returned to Georgia and executed two written waivers. The Georgia Supreme Court further held:

> In our view it would be unreasonable to hold that an assertion of rights in the asylum state (assuming one occurred) operated to prevent any further inquiry by authorities in the requesting state as to whether the accused would like to speak to them, where the requesting authorities reasonably understood that no request for counsel had been made. 249 Ga. at 82.

In Edwards v. Arizona, supra, the suspect was advised of his rights, made an alibi statement and thereafter when discussing the possibility of a plea bargain stated: "I want an attorney before making a deal." 68 L.Ed.2d at 382. The next morning colleagues of the officer to whom Edwards indicated his desire for attorney, ignored Edwards' assertion that he did not want to talk to anyone, then proceeded to advise him of his rights and obtain an incriminating statement. This Court held:

> It is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel. 68 L.Ed.2d at 387 (emphasis added).

As noted by the Georgia Supreme Court, the present case shows no clear assertion of the right to counsel as opposed to Edwards' straightforward request which apparently was tape recorded. In addition, the instant case does not involve "reinterrogation" by the same authorities; the New Orleans authorities held Petitioner on a fugitive warrant whereas the Georgia authorities questioned Petitioner regarding the crime when he was taken into their custody on the murder charge.

Based on the foregoing, it is apparent that Edwards v. Arizona, supra, is not controlling and that the dictates of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were fully complied with here. Accordingly, this argument presents nothing for the review of this Court.

III. CONTRARY TO APPELLANT'S CONTENTIONS THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE SENTENCING PHASE REGARDING ITS AUTHORITY TO CONSIDER EVIDENCE IN AGGRAVATION.

Petitioner contends that the trial court's alleged failure to clearly instruct the jury could have resulted in the jury imposing the death sentence by utilizing Petitioner's prior armed robbery conviction or escape as a statutory aggravating circumstance.

An examination of the trial judge's instructions to the jury clearly reveals that the only statutory aggravating circumstance submitted to the jury was Ga. Code Ann. § 27-2534.1(b)(7):

> Now, in this case of the State v. Wayne Ladd Krier, the prosecution contends that the offense of murder, for which the defendant has now been convicted, was committed under the following statutory aggravating circumstances: (sic)
>
> The State contends that the offense of murder, as committed by the defendant, Wayne Ladd Krier, was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, Teresa Lavin.
>
> If in fact you find, beyond a reasonable doubt, that this statutory aggravating circumstance did in fact exist, then I

> charge you that such a circumstance is defined as a statutory aggravated circumstance under the law of this State and such a finding would authorize you, but not compel you, to recommend the death sentence. (T. 1489-90).

The judge further stated to the jury that, if the aggravating circumstance described was not proved beyond a reasonable doubt, they would not be authorized to recommend the death penalty. (T. 1493).

There is no suggestion in any part of the record of Petitioner's trial which would lead the jury to conclude that it could impose the death sentence on the basis of Petitioner's armed robbery conviction or escape.

The introduction of additional evidence at the sentencing phase, which does not support a statutory aggravating circumstance, is authorized by the Georgia statute, 4/ as held constitutional in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1978) and by the Georgia Supreme Court. In Green v. State, 246 Ga. 595, 272 S.E.2d 324 (1980),the Court rejected Appellant's argument that admission of evidence at the pre-sentencing hearing which does not support an aggravating circumstance is unconstitional:

> . . . it is also constitutionally required that a statute providing for the death penalty allow the sentencing body the

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4/ Ga. Code Ann. § 27-2534.1(b) provides that the judge "shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence . . ."

discretion to weigh all aspects of the defendant's character and record as well as the circumstances of the offense. See Lockett v. Ohio, supra; Fair v. State, 245 Ga. App. (sic) 868 (268 S.E.2d 316) (1980).

The instructions in this case clearly directed the jury's consideration to finding the subsection (b)(7) statutory aggravating circumstance as a pre-condition to any determination as to whether the death sentence could be imposed and then properly channeled their attention to all evidence presented at either phase of the trial which might be mitigating or aggravating.

Therefore, Petitioner's argument regarding the constitutionality of the sentencing procedure in the present case does not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Wayne Ladd Krier.

Respectfully submitted,

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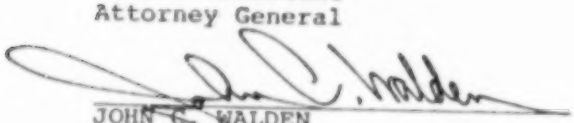

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